

Supreme Court, U. S.
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In The
Supreme Court of the United States

October Term, 1978

No. **78-161**

State of Iowa, State Conservation Commission of the
State of Iowa,

Petitioners,

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin,
R.G.P. Incorporated, Darrell L., Harold, Harold M. and
Luea Sorenson, Harold Jackson, Otis Peterson and
Travelers Insurance Company,

Respondents (Petitioners on Separate Petitions),

vs.

Omaha Indian Tribe and United States of America,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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—o—

The above-named petitioners respectfully pray that
a writ of certiorari issue to review the judgment and opin-
ion of the United States Court of Appeals for the Eighth
Circuit entered in this proceeding on April 11, 1978.

—o—
OPINIONS BELOW

The opinion of the Court of Appeals, reported at 575
F.2d 620, appears as Appendix A hereto. The memoran-
dum opinion and the findings of fact and conclusions of
law of the District Court for the Northern District of

Iowa are reported, *United States v. Wilson*, 433 F. Supp. 67. Copies appear as Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on April 11, 1978. A timely petition for rehearing, with suggestion that rehearing be in banc, was filed on April 25, 1978 and denied on May 2, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the State of Iowa is "a white person", and the Omaha Indian Tribe is "an Indian" within the meaning of 25 U. S. C. § 194.

2. Whether the State of Iowa may be divested from title to land within its boundaries on the mere possibility that the land had been owned by Indians more than a century ago.

3. Whether a statute which allocates the burden of proof in a trial concerning property on the basis of the litigants' classification as "an Indian" and as "a white person" violates the due process and equal protection guarantees of the Fifth Amendment.

4. Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code, Title 25

§ 194. *Trial of right of property; burden of proof*

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R. S. § 2126.

Derivation. Act of June 30, 1834, C. 161, § 22, 4 Stat. 733.

United States Constitution, Amendment V, Due Process Clause

No person shall . . . be deprived of life, liberty or property, without due process of law;

United States Constitution, Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Other statutory provisions referred to herein as helpful in interpreting § 194 are included in Appendix E. They are the following:

An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers,

approved March 30, 1802, sections 4 and 12, 2 Stat. 139, 141, 143.

An act to amend an act entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers", approved thirtieth of March, one thousand and eight hundred and two, approved May 6, 1822, Section 4, 3 Stat. 682, 683.

An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved June 30, 1834, sections 12, 16 and 22, 4 Stat. 729, 730, 731, 733.

STATEMENT OF THE CASE

This is a Petition by the State of Iowa for a Writ of Certiorari to review an order of the Eighth Circuit Court of Appeals reversing the United States District Court for the Northern District of Iowa and divesting the State of Iowa and other Iowa title-holders from possession and ownership of 2900 acres of land adjacent to the Missouri River in the State of Iowa. The Court of Appeals quieted title to the land in the Omaha Indian Tribe. Prior to the Court of Appeals decision, the Omaha Indian Tribe's reservation lay entirely on the opposite bank of the river, in the State of Nebraska. The basis for the Court's decision is a federal statute enacted in 1834 and never applied in any reported case. It states:

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

25 U. S. C. § 194 (1970).

The Eighth Circuit Court of Appeals improperly reversed the trial court's ruling that the statute does not apply. In doing so, the Court of Appeals committed three fundamental errors: it held, without explanation, that the sovereign State of Iowa, which is comprised of citizens of diverse racial extraction, including Indians, Orientals, Mexican-Americans and Blacks, is a "white person" and therefore subject to the statute; it relied on a statute unconstitutional on its face, and as applied; and it reversed the trial court's finding of fact that the land involved was never in possession of the Omaha Indian Tribe or its members and, therefore, that the quoted statute did not apply (and it did so by applying the above-quoted statute on the *possibility* that the land had been in the possession of Indians in the distant past).

The Eighth Circuit's reading of "white person" to include the State of Iowa, thereby placing the burden of proof upon the State-defendant in a dispute involving land apparently owned by it, violates established constitutional principles of Federalism. This is particularly true in this case, where there is *no* indication that Congress ever intended such a reading of the statute and, in fact, such a reading would violate the plain meaning of the words both in the sense of their common usage and as interpreted by this court in other contexts.

The statute classifies litigants strictly and solely on the basis of race, and allocates the burden of proof on the basis of that classification. Burden of proof was outcome determinative; the Court of Appeals' decision, if allowed to stand, will result in the divestiture in every such case of every litigant classified as a "white person"

from possession of and apparent good title to land. A litigant so classified is thereby severely disadvantaged vis-a-vis an Indian plaintiff seeking to remove him. He is also severely disadvantaged when compared to a non-white person defendant, Indian or not, in whose case there is no such presumption. The statute does all of this without any findings, legislative or otherwise, of past discrimination. Indeed, such findings would not be possible regarding the State of Iowa. Such a statute plainly constitutes an exercise of Congressional power in an inappropriate manner with relation to the states.

REASONS FOR GRANTING THE WRIT

1. 25 U. S. C. § 194 is not applicable in a trial between a sovereign state of the United States and an organized Indian tribe represented by the United States Government.

The statute here in issue, 25 U. S. C. § 194, states,

In all trials about the right of property in which *an Indian* may be a party on one side, and *a white person* on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. (Emphasis added.)

The State of Iowa is not "a white person", but on the contrary, is a sovereign state of the United States, made up of millions of individuals of diverse racial extraction, including Indians, as well as Blacks, Orientals,

Mexican-Americans and Caucasians. Reading "person" to include states violates the plain meaning of the words used, both in the sense of their common usage and as interpreted by the Court in other contexts. See, e. g., *South Carolina v. Katzenbach*, 383 U. S. 301, 324 (1966). Much less is this interpretation appropriate when the term used is "white person". *United States v. Perryman*, 100 U. S. 235 (1880).

And the above quoted statute, on its face, applies to individual Indians, and not to a tribe of Indians. The history of the legislation shows that the term "Indian" was used advisedly in the singular. The predecessor to 25 U. S. C. § 194 first appeared in an 1822 act to regulate trade and intercourse with the Indian tribes, and the word "Indians," in the plural, was used. In 1834, the term was changed to "Indian", in the singular, making it clear that the statute was intended to be applied to individual Indians, and not to groups of Indians (App. E).

This is further verified from the fact that § 12 of the act was also amended in 1834. In its 1802 form, § 12 declared any conveyance of land "from any *Indian or* nation or tribe of Indians" invalid, unless conveyed by treaty or convention. In 1834 the words "Indian, or" were deleted. It is evident from this that Congress intended to accord the protection of § 12 to nations or tribes of Indians, only, and the protection of § 22 (now § 194) to individual Indians, only.

In addition, it is clear that the statute was intended for the protection of individual Indians who might otherwise be the subject of fraud and overreaching on the part of a white person. It follows from this that the word

"Indian" was not intended to apply to a tribe of Indians represented by the United States Government. Likewise, there is no indication of any congressional purpose to protect an Indian from fraud and overreaching on the part of a sovereign state of the United States. Yet this is a necessary implication of the Court of Appeals' ruling.

If followed, this ruling will result in the application of 25 U. S. C. § 194, in property disputes involving Indians against any State of the United States and the Federal Government itself, and may result in the divestiture of countless acres of State and Federal lands.

2. The Court of Appeals determined the issue before it and divested the State of Iowa from title to the land on the mere possibility that it had been owned by Indians in the distant past.

25 U. S. C. § 194 provides that the burden of proof shall rest upon the white person,

" . . . whenever the Indian shall make out a presumption of title in himself from the *fact of previous possession or ownership*." (Emphasis added.)

The foundational fact which must be proven before § 194 can be invoked is that the Indian had "previous possession or ownership" of the disputed property. This was the ultimate issue to be decided in the case at bar. And the trial court found, on the basis of the evidence presented, that the land was never in the possession of the Omaha Indian Tribe, but on the contrary, was land formed on the Iowa bank of the River between 1875 and 1923, many years after Indian land in the same locality was washed away and destroyed by the River.

The Eighth Circuit Court of Appeals, however, invoked § 194 upon the foundational fact that an 1867 survey showed a portion of the Omaha Indian Reservation, on the Nebraska bank of the River, occupied the disputed area *at the time of the survey*. Then the Court of Appeals, applying § 194, cast the burden of proof on the State of Iowa, and reversed the trial court's finding that the Indian land had been washed away and destroyed by the River and replaced by new land on the opposite bank of the River. The most that can be said for the Court of Appeals' ruling is that it invoked § 194 on a mere possibility that the land in issue was in the possession of Indians more than a century ago.

The Court of Appeals necessarily committed one or both of two errors: it applied § 194 in the absence of the "fact of previous possession or ownership"; and it utilized the authority of the statute to find the fact which was requisite to the statute's application. And in doing so, it reversed the trial court's opposite finding. This involuted reasoning circumvents any recognized judicial fact finding process envisioned by the Due Process Clause to the Fifth Amendment.

The Court of Appeals determined the issue before it on the basis of this application of 25 U. S. C. § 194, and divested the State of Iowa from apparent good title to the land. The decision, if followed in other cases, would have incalculable results, because, according to the Court of Appeals' reasoning, a presumption of good title arises in favor of Indians whenever it may be shown that Indians *might at one time* have had possession or ownership of the land in issue. This would involve vast quantities

of land privately owned and owned by the various states of the United States and by the United States Government itself.

3. 25 U. S. C. § 194 is unconstitutional on its face and as applied.

25 U. S. C. § 194 places the burden of proof in any property dispute upon a white person litigant in any trial where an Indian is a party on the other side and the Indian makes out a presumption of title in himself from the fact of previous possession or ownership. Thus, litigants are classified on the basis of race, and burden of proof is allocated on the basis of that classification.*

Any litigant classified as "a white person" is severely disadvantaged vis-a-vis a litigant classified as "an Indian" who seeks to remove him. He is also severely disadvantaged when compared to a non-white person litigant, Indian or not, who litigates against an Indian and against whom there is no such presumption. And

* "The word 'person' in the context of the Due Process Clause of The Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union. . . . [However] objections to the Act which are raised under these provisions may be considered . . . as additional aspects of the basic question presented by the case: Has Congress exercised its powers . . . in an appropriate manner with relation to the States?" *South Carolina v. Katzenbach*, 383 U. S. 301, 323-24 (1966).

One of the ironies of this case is that while the state is not a "person" for purposes of direct application of Fifth Amendment protection of property rights, under the Eighth Circuit Court of Appeals' decision below the state is considered a "white person" for purposes of divesting it of its property.

given the Eighth Circuit Court of Appeals' holding regarding proof of the foundational fact of previous possession or ownership, the sweep of the statute's application is greatly expanded, and the disadvantage to "white person" litigants is greatly augmented.

The statute does this without any findings, legislative or otherwise, of past discrimination, or of any coherent rationale upon which the effects of past discrimination may be remedied by the statute. *Regents of the University of California v. Bakke*, — U. S. — (1978). And, indeed, such findings would not be possible regarding the State of Iowa.

4. The Court of Appeals decision violates established principles of Federalism.

The land here in dispute lies along the banks of the Missouri River entirely within the boundaries of the State of Iowa. The Court of Appeals' application of federal law to this case violates the long standing federal commitment to apply state law to settle real property disputes, including questions of riparian rights along navigable rivers within the boundaries of the various states. In *Oregon v. Corvallis Sand and Gravel Co.*, 429 U. S. 363, 370 (1977), this Court held,

" . . . Although Federal law may fix the initial boundary line between fast lands and the riverbeds at the time of a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasement by operation of any federal common law."

It follows from this that a reservation of land west of the Missouri River to the Omaha Indian Tribe in 1854

could not defeat the previous grant to the State of Iowa at the time of its admission to the Union in 1846; and such reservation to the Tribe does not furnish an adequate basis for application of federal law to defeat titles apparently good in Iowa. Nor does the fact that the Missouri River was the boundary between Iowa and Nebraska, and between Iowa and the Omaha Indian Reservation, before the Iowa-Nebraska Boundary Compact of 1943, require application of Federal law different from State law. Potential disputes concerning the location of the boundary were settled by the Boundary Compact, and there is no way this litigation can affect it. Finally, there is nothing in the language of 25 U. S. C. § 194 or its legislative history to indicate that Congress intended it to be applied against a sovereign state of the United States.

CONCLUSION

The Court of Appeals' opinion, if followed, could have fantastic results. It could operate to divest any non-Indian litigant, including States and the Federal Government, from apparent good title to land, whenever it could be shown that Indians might, in the distant past, have had possession or ownership.

Respectfully submitted,

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